No. 15920

# United States
# Court of Appeals
## For the Ninth Circuit

EINAR GLASER and DOROTHY GLASER,

Appellants,

vs.

MARGUERITE L. CONNELL,

Appellee,

WILLIAM F. WHITE and JANET D. WHITE,

Defendants.

# Appellants' Reply Brief

**Appeal from the United States District Court for the Western District of Washington, Northern Division.**

HON. GEO. H. BOLDT, Judge

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### Res Judicata — Collateral Estoppel

### I.

Appellee, (page 2) in her brief, contends that the nature of Case No. 3556 (Exh. 4) was such that it cannot possibly constitute a bar to this case upon the theory of res judicata, collateral estoppel, etc. It is claimed appellants were dismissed from that case one week prior to judgment being entered therein in favor of

appellee and against the other defendants and because of that dismissal, it resulted in making appellants total strangers to the judgment.

In support thereof appellee cites Sec. 79 of the Restatement, Judgments, and authorities of Colorado and California courts. An examination of those authorities clearly reveals they have no application for the reason they refer to cases not tried on the merits, but were dismissed for either a jurisdictional reason or a party dismissed from the case was not a party interested in any of the issues. Those situations, however, did not in any degree exist in Case No. 3556. Appellants were parties in Case No. 3556 who were relieved of liability after a complete trial on the merits and issues. Exhibit 4 in this case at bar contains a copy of the Judgment Order dated January 10, 1955, disclosing that a trial on the merits resulted favorable to appellants. The exhibit also contains the Findings of Fact and Conclusions of Law dated January 17, 1955. Finding of Fact No. 33 and Conclusions of Law No. 2 confirms the judgment on the merit as to appellants.

Thus, every contention raised by appellee in this case at bar as a defense, and every question of fact essential to a judgment was actually litigated and determined in Case No. 3556.

In the recent case of **Hoag v. New Jersey,** 356 U.S.

....., 2 L. Ed. 913, 78 S. Ct., Mr. Justice Harlan, re-emphasized the principle of collateral estoppel:

> "A common statement of the rule of collateral estoppel is that 'where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action.' Restatement, Judgments, Sec. 68 (1). As an aspect of the broader doctrine of res judicata, collateral estoppel is designed to eliminate the expense, vexation, waste, and possible inconsistent results of duplicatory litigation. See Developments in the Law—Res Judicata, 65 Harv L Rev. 818, 820."

For the reasons above stated, appellee's contention that appellants were strangers to Case No. 3556 is untenable.

**II.**

On pages 5-8 of appellee's brief, as another specious reason to assume that Case No. 3556 is not res judicata, it is claimed that in order for her to have had the note and mortgage cancelled she was required to prove in said cause that appellants accepted those instruments with actual knowledge of the fraud. This Court, in **Errion, et al v. Connell,** 236 F. 2d 447, disposed of that viewpoint when it sustained the plenary jurisdiction of the lower court.

"It is alleged in the complaint in our case, and

> the trial court found, a **single cause of action** involving a **single fraudulent scheme** to defraud Mrs. Connell of her property. There were involved two types of property, one being securities over which the federal court had jurisdiction, and the other non-securities over which the federal court normally has no jurisdiction. But the single fraudulent scheme arising out of the same set of facts encompassed both types of property. The thought of requiring two law suits in this situation is untenable. We therefore hold that the trial court could correctly award damages for the entire fraudulent scheme, even though non-securities were involved."

On page 9 of appellee's brief she refers to Sec. 28 of the Securities Exchange Act of 1934, and contends it authorizes her to relitigate all the facts a second time. It must be borne in mind that appellee elected to join appellants as parties in Case No. 3556. She submitted for determination appellants' rights in the note and mortgage.

In our opening brief, page 16, et seq., we point out that appellee not only demanded pecuniary restitution and received it, but also demanded a cancellation of the note and mortgage. In Case No. 3556, the trial court awarded appellee relief by way of pecuniary restitution, in lieu of cancellation. Appellee did not appeal therefrom, and she is thereby, and ought to be, estopped by the principles of res judicata and collateral estoppel.

On Page 10 of appellee's brief it is claimed that no

essential facts were litigated in Case 3556, and hence, the doctrine of collateral estoppel is inapplicable. This is contrary to the facts. The court in that case had before it the issue of cancellation of the note and mortgage, or in lieu thereof pecuniary restitution. The court recognized appellants were the lawful owners and holders of the note and mortgage, and having found them innocent of any wrongdoing, entered a judgment against Errion, et al, for the value thereof, after allowing as a credit the value of the properties restored by him to appellee. For a further explanation the Court is respectfully referred to pages 19-21 of our opening brief.

Thus, collateral estoppel is a most important aspect of this case. This principle of law being designed to eliminate the expense, vexation, waste, and possible inconsistent results of duplicatory litigation, is pertinent and decisive of the issues in this case.

**Estoppel in Pais**

**I.**

Appellee contends it was necessary for appellants to show themselves free of negligence before urging the equitable doctrine of comparative innocence or estoppel in pais and in support thereof, cites **Liska v. Beckmann,** 168 Wn. 489, 12 P. 2d 599. A reading of that case discloses it to be inapposite. That case in-

volved the question of priority between two mortgagees as assignees of a common assignor of mortgages covering the same real property. The assignor was an embezzler. A son-in-law of the plaintiff mortgagee was an employe of the embezzler. The court found that the plaintiff should have examined the record of titles in the county auditor's office and if she had done so would have learned of the prior unsatisfied mortgage. This conduct on her part deprived her of the application of equitable estoppel.

The case at bar has no such factual background. Had appellants in this case examined the county auditor's office records they would have found that appellee was the record owner of the property, subject to a $16,000 mortgage to Holdorf Oyster Corporation. Thus, there is absolutely no evidence that appellants were negligent. They displayed the same confidence in Errion, the Master of Chicanery, as had appellee, and were led to believe that appellee's note and mortgage were genuine.

They were, in fact, genuine insofar as appellee was concerned, for she, as a responsible person, gave them to Errion as part of a business transaction whereby she obtained from him a re-conveyance of her property. He was then retained as her agent to sell this property so she could realize $20,000 and she agreed he was to have $16,000 out of the deal. She entrusted him with

the note and mortgage and he violated his trust by pocketing the $16,000 after assigning the instruments to appellants.

To analyze and distinguish all of appellee's authorities would extend this brief to no end. The Washington authorities cited by us in our opening brief are on all fours with this case at bar.

## II.

Appellee disingenuously also charges appellants with lack of good faith for being ensnared by Errion, notwithstanding her sole defense is predicated upon a similar technique utilized by him to ensnare her.

Appellee is of the age of 88 and a widow and this does engender sympathy for her plight. However, in considering this case and the relief sought, the issue before the Court is, who should bear the loss where both parties were victims of a Master of Chicanery?

**Appellee's Association, Acts and Conduct with Errion.**

1. Errion was introduced to her as a salesman who could sell snowballs in Hades—a clever man.

2. In 1949 she willingly and knowingly, but improvidently, transferred to him all her properties.

3. She had consulted a Dr. Kincaid who cautioned her against associating with Errion.

4. Errion's countless and shabby promises did not arouse her suspicions about him.

5. Coos County, Oregon condemnation proceedings did not materialize as he had assured her would result in a substantial profit.

6. She kept after him constantly for money and all she received were alluring promises.

7. She first heard of Einar (appellant) and McKenney, when she demanded monies of Errion and he told her he was in a big logging deal for them, there was about 55 heirs involved etc. All this tempted appellee.

8. Errion discouraged her from buying another home.

9. She demanded $20,000 for her property.

10. Errion represented he could get her $20,000, as follows:

. . . I have a logger who has a large family. He wants to send his boy to the University of Washington. He will pay you $36,000 for the home. I will sell it to him for this price and you will get $20,000 and I will get $16,000. I will convey the house back to you. You will execute a deed to him and you will also execute a note and mortgage for $16,000 to me. (Holdorf Oyster Corporation) . . .

11. At the time the note and mortgage were to be executed, she resisted because they were predated one year. Errion told her it would appear more plausible if the note were predated.

12. She asked him why she should be required to sell the property and he told her it would make it more attractive for the purchaser if she had the title.

13. She strenuously objected to putting the note and mortgage into circulation for she was concerned about not being able to pay it and would lose the property.

14. Appellee suffered no detriment as a result of this transaction. She had been deprived of this $45,000 property in 1949. As a result of the note and mortgage transaction she was vested with title and deducting the amount of the mortgage, she benefited to the extent of $29,000.00.

**Appellants' Acts and Conduct**

1. Errion secured their confidence by virtue of a beguilement technique as was applied to appellee. After managing to ensnare them into his confidence he succeeded in persuading their purchase of the $16,000 note and mortgage and pay him the full value therefor.

2. They did not question the explanations of his possession of the note and mortgage and if they had examined the county auditor's deed records it would have reflected the actual situation, to-wit: appellee was the owner of the property which was subject to the $16,000 mortgage.

3. Value of security. An investigation by appellants would have disclosed that the property was worth substantially more than the amount of the mortgage and that the security was adequate.

4. If any inquiry had been made of appellee the only fair and reasonable inference to be drawn from the record is that she would have unquestionably ratified the transaction for she already had been conditioned to approve it in the event appellants contacted her. Of course, she was vitally concerned in obtaining $20,000.00 for herself.

## III.

In comparing the acts and conduct of appellee with the acts and conduct of appellants, we believe it is a fair statement in concluding, that appellee's entire experiences with Errion and his intriguing swindles, were such that she had notice of facts such as would put a reasonably prudent person upon inquiry, whether to continue in a business association with such a rogue. It is not a question whether she had the means of obtaining and by prudent caution have obtained knowledge that he was in fact a swindler, but she admitted under oath when she executed the note and mortgage, she believed he and his crowd were, in fact, frauds and scoundrels. With full knowledge of his predilections she freely continued to transact business with him and placed into his hands her negotiable $16,000 note and mortgage. Her acts and conduct, at that time, were those of a person of responsibility and competence and were acts of gross and culpable negligence.

On the other hand, in what way were the appellants guilty of any carelessness or wrongdoing? If they had had the courthouse records examined with reference to the title to appellee's property prior to purchasing the note and mortgage, they would have found it belonged to appellee and subject to a $16,000 mortgage. There would be nothing in the records of the county auditor to suggest any impropriety. In fact, appellee

admits the note and mortgage were genuine at the time she executed them and that they were deliberately executed as part of a business transaction with Errion.

We do not believe any person in the position of appellants would believe there was anything about the note and mortgage to excite inquiry. The presumption is in favor of legal conduct and not in favor of violations of obligations. It was more natural for appellants to assume that Errion acted rightfully on account of his general relationship to them, and bearing in mind, **that at that time,** appellants were wholly unaware he was a rogue, although appellee was fully cognizant of his umbrageous character. In this regard, **Tobey v. Kilbourne,** 222 Fed. 760 (9) is pertinent and has parallel features to this case at bar and this Court affirmed a decree refusing to set aside a conveyance of land obtained by fraud. In answer to a question of a witness whether, in dealing with a corporation claiming to own property, where it claimed its resources consisted of real estate, it would not be a person's duty as a business man to investigate, the witness said:

> "It might be. It would vary under different circumstances according to the degree of confidence I had in them, and I certainly had a good deal in Mr. De Larm (The confidence man). At that time he impressed me very favorably indeed."

In speaking of De Larm, the witness further stated:

"He made a great many promises that he never carried out, and still he had a way about him that, up until January, 1912, I really believed the fellow was sincere and honest, and would carry out his scheme."

## CONCLUSION

Since the filing of our opening brief, Case No. 15689, Helen A. Davenport, appellant, vs. United States of America, appellee, has been filed with the Court. It is another swindle involving Errion. The facts in that case, and all the cases cited by us on page 4 of our opening brief, indubitably establishes him as a fabulous rogue. From it all, it is clearly understandable why appellants were induced to pay over $16,000. The acts and conduct of appellee in placing the note and mortgage in his hands were the roots from which he gathered some of his crop.

The equities are with appellants and the decree of the lower court should be reversed.

Respectfully submitted,

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